90-749

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JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA, GEORGE S. MICKELSON, GOVERNOR, ROGER A. TELLINGHUISEN, ATTORNEY GENERAL, JIM JONES, SUPERINTENDENT, HIGHWAY PATROL, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

ROSEBUD SIOUX TRIBE, CHEYENNE RIVER SIOUX TRIBE, OGLALA SIOUX TRIBE, STANDING ROCK SIOUX TRIBE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-5227

Rosebud Sioux Tribe, Appellant, Cheyenne River Sioux Tribe, Intervenor, Oglala Sioux Tribe, Standing Rock Sioux Tribe, Appellants, v. State of South Dakota; George S. Mickelson, Governor; Roger Tellinghuisen, Attorney General; Jim Jones, Superintendent of the Highway Patrol, In Their Official Capacities, Appellees.	*	Appeals from the United States District Court for the District of South Dakota.

No. 89-5228

Rosebud Sioux Tribe, *
*
Cheyenne River Sioux *
Tribe, *
*
Appellant, *
*
Oglala Sioux Tribe and *
Standing Rock Sioux *
Tribe, *
*
Intervenors- *
Plaintiffs Below, *
*
v. *
*
State of South Dakota; *
George S. Mickelson, *
Governor; Roger *
Tellinghuisen, Attorney *
General; Jim Jones, *
Superintendent of the *
Highway Patrol, In Their *
Official Capacities, *
*
Appellees. *

No. 89-5252

Rosebud Sioux Tribe, *
*
Appellee, *
*
Cheyenne River Sioux *
Tribe, Oglala Sioux *
Tribe, and Standing Rock *
Sioux Tribe, *
*

(Plaintiff/ Intervenors Below) Appellees,

v.

State of South Dakota; George S. Mickelson, Governor; Roger Tellinghuisen, Attorney General; Jim Jones, Superintendent of the Highway Patrol, In Their Official Capacities,

Appellants.

Submitted: October 13, 1989

Filed: March 16, 1990

Before LAY, Chief Judge, McMILLIAN and WOLLMAN, Circuit Judges.

LAY, Chief Judge.

This action was originally commenced by the Rosebud Sioux Tribe, later joined by the Cheyenne River Sioux Tribe, the Oglala Sioux Tribe and the Standing Rock Sioux Tribe (the Tribes), to enjoin the State of South Dakota from exercising civil and criminal

jurisdiction over highways running through Indian land[1] in the state. The district court[2] upheld the state's assertion of

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[1]While the terms "Indian land" or "reservation" are used to identify the geographic area of jurisdiction, the more accurate term is "Indian country," defined as:

> Except as otherwise provided in sections 1154 and 1156 of this title the term "Indian country", as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1988).

[2]The Honorable Donald Porter, United States District Judge for the District of South Dakota.

jurisdiction. The Tribes have appealed; the state has cross-appealed the district court's finding that its jurisdiction is concurrent with tribal authorities. We find the district court erred. Absent tribal consent, we hold the State of South Dakota has no jurisdiction over the highways running through Indian lands in the state. We reverse and remand to the district court to enter judgment in favor of the Tribes.

BACKGROUND

When South Dakota was admitted to the Union, an act of Congress required a disclaimer of jurisdiction over Indian land be included in the state constitution:

> [T]he people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States,

> the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. See also S.D. Const. art. XXII; id., art. XXVI, § 18.[3] In 1953, Congress modified the federal-tribal scheme of jurisdiction over Indian land to allow states to assume jurisdiction over Indians within the state. See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified in part at 18 U.S.C. § 1162 (1988) (PL 280). While PL 280 allowed an express, immediate cession of jurisdiction to

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[3]Similar disclaimers were adopted in the state constitutions of Washington, Montana, North Dakota, Utah, Oklahoma, Arizona, and New Mexico as a condition of their admittance to the Union. See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 479 & n.23 (1979).

some states, see 18 U.S.C. § 1162(a),[4] other states fell within the provisions of sections 6 and 7 of PL 280, which provided the option of assuming jurisdiction. Section 7 of PL 280 provided:

> The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both as provided for in the Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislation, obligate and bind the State to assumption thereof.

PL 280, § 7, 67 Stat. 588, 589, repealed by Act of Apr. 11, 1968, Pub. L. 90-284, § 403, Title IV, 82 Stat. 73, 79.

South Dakota responded to the congressional offer of jurisdiction in 1957

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[4] California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska were the "mandatory" states to which jurisdiction was immediately ceded. See 18 U.S.C. § 1162.

with legislation accepting criminal and civil jurisdiction if the affected Tribes consented. See S.D. Codified Laws Ann. §§ 1-1-12 - 16 (1985). Since tribal consent was not given, jurisdiction was never assumed under this law. In 1959, South Dakota enacted a statute assuming jurisdiction over highways jointly maintained with the federal government. See S.D. Codified Laws Ann. § 1-1-17. The prerequisite to assumption of jurisdiction in this statute, that the roads be jointly maintained by the state and federal government, was never met. Thus, these statutes, which appear in the current codification of South Dakota's statutes,[5]

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[5]The commentary following section 1-1-12 notes that these statutes are not repealed but possibly viable: "The case of Washington v. Confederated Bands and Tribes of Yakima Indian Nation, * * * may change one or more of the interpretations of these statutes, so

(Footnote Continued)

remain imperative. See In re High Pine, 78 S.D. 121, 99 N.W.2d 38 (1959).

In 1961, South Dakota enacted the legislation that is at issue in this case. This legislation accepted all civil and criminal jurisdiction, conditioned on federal reimbursement, with a notable exception:

> The state of South Dakota, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280), hereby assumes and accepts jurisdiction of all criminal offenses and civil causes of action arising in the Indian country located within this state, as Indian country is defined by Title 18 United States Code, section 1151, and obligates and binds this state to the assumption thereof[.]
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> * * * *
>
> Except as to criminal offenses and civil causes of action arising on any highways, as the term is defined in chapter 31-1, the

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(Footnote Continued)
they are being reprinted until further disposition is made of them." S.D. Codified Laws Ann. § 1-1-12, Commission Note.

> jurisdiction provided for in § 1-1-18 shall not be deemed assumed or accepted by this state, * * * unless and until the Governor of the state of South Dakota, if satisfied that the United States of America has made proper provision for the reimbursement to this state and its counties for the added costs in connection with the assumption of said jurisdiction, has issued his proper proclamation duly filed with the secretary of state declaring the said jurisdiction to be assumed and accepted.

S.D. Codified Laws Ann. §§ 1-1-18, 1-1-21 (1985) (emphasis added) (1961 legislation). The general assumption of jurisdiction did not occur since the Governor of South Dakota never filed the required proclamation. A subsequent attempt in 1963 to assume complete civil and criminal jurisdiction without the federal reimbursement condition failed when the legislation was defeated in a referendum vote. See Act of Mar. 15, 1963, Ch. 467, 1963 S.D. Laws 522; S.D. Codified Laws Ann. § 1-1-12 Commission Note (1985) (chapter 467

defeated in referendum vote by 3 to 1 margin).

The exception in the 1961 legislation purportedly allowed the state to exercise jurisdiction over highways in Indian country from 1961 forward. In 1964, however, the South Dakota Supreme Court invalidated the 1961 legislation. See In re Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964). The court concluded the state's assumption of highway jurisdiction did not effectively remove the constitutional disclaimer because PL 280 did not permit a state to assume partial subject-matter jurisdiction. Id. at 442-43, 125 N.W.2d at 842-43. The 1961 legislation was never repealed but appears in the current official codification of the state laws. The state did not pursue highway enforcement efforts after the Hankins decision, and judicial decisions reflected the state's lack of jurisdiction over Indians on Indian land.

See, e.g., State v. Molash, 86 S.D. 558, 199 N.W.2d 591 (1972); Smith v. Temple, 82 S.D. 650, 152 N.W.2d 547 (1967).

In 1968 Congress amended PL 280 to require tribal consent prior to any assumptions of jurisdiction. The pertinent language of the 1968 amendment reads as follows:

> The consent of the United States is hereby given to any State not having jurisdiction over [civil or criminal causes of action] in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over [civil or criminal causes of action] as may be determined by such State to the same extent that such State has jurisdiction over [other civil or criminal causes of action] * * *
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> * * * *
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> SEC. 403 (a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by

> such State pursuant to [PL 280], as it was in effect prior to its repeal by subsection (b) of this section.
>
> (b) Section 7 of [PL 280] is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Act of Apr. 11, 1968, Pub. L. 90-284, Title IV, §§ 401-03, 82 Stat. 73, 78-79 (codified at 25 U.S.C. §§ 1321(a), 1322(a), 1323 (1982)) (emphasis added). The tribal consent requirement did not apply to states that had assumed jurisdiction prior to the repeal of section 7. See Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 150 (1984).

In 1979 the United States Supreme Court decided Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979). Yakima ruled that the Washington jurisdiction statute validly assumed partial jurisdiction under the pre-1968 version of

PL 280. After Yakima, South Dakota began urging in state courts that it had validly assumed highway jurisdiction in the 1961 legislation. The 1961 legislation reappeared in the 1985 codification of state laws in response to Yakima.[6] The South Dakota Supreme Court in State v. Onihan, 427 N.W.2d 365 (S.D. 1988) ruled that, in light of Yakima, Hankins was overruled; the court then concluded that the 1961 legislation was a valid assumption of jurisdiction over highways in Indian land. Onihan, 427 N.W.2d at 367-68. The Onihan court also found the 1968 tribal consent amendment did not apply since the state had validly assumed jurisdiction prior to the amendment. Id. at 367.

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[6]The 1961 legislation was not included in the 1974 codification of state laws.

The Tribes filed this action in federal district court on May 14, 1986, seeking declaratory and injunctive relief restraining the state from exercising jurisdiction over highways on Indian land. The parties filed cross-motions for summary judgment. The district court denied the Tribes' motion, and granted summary judgment in favor of the state. The district court concluded the state validly assumed highway jurisdiction in 1961 and that the 1968 amendment did not apply to the state. Rosebud Sioux Tribe v. South Dakota, 709 F. Supp. 1502 (D.S.D. 1989). The Tribes now appeal.

DISCUSSION

The question before this court is whether South Dakota currently has civil and criminal jurisdiction over highways running through Indian land in the state. The fundamental issue is whether the state, which began re-asserting its jurisdiction over the

highways after the 1979 Yakima decision, is bound by the 1968 amendment requiring consent of the affected Tribes. The Tribes argue that in 1968, when PL 280 was amended, the state did not have PL 280 jurisdiction and consequently was bound by the amendment. The Tribes rely principally on the statements and representations made by representatives of South Dakota before congressional committees considering the PL 280 amendments which suggest South Dakota had not assumed jurisdiction under the pre-amendment version of PL 280. The Tribes contend Congress relied on those representations and intended South Dakota be bound by the tribal consent amendment.

The state contends it is not bound by the 1968 amendment, arguing that it never lost the jurisdiction obtained in the 1961 legislation. The state advances two arguments to support this theory. First,

PL 280 as originally enacted did not provide for a method by which states could retrocede, or give back, the jurisdiction assumed. Once South Dakota assumed jurisdiction, the state argues it could not lose it, notwithstanding the Hankins decision. Second, the state contends the only consistent resolution of this case is to find it validly assumed jurisdiction in 1961. To rule otherwise would be an implicit adoption of Hankins, which was overruled by Yakima and Onihan.

The district court, although distinguishing between the Washington jurisdiction statute in Yakima and South Dakota's statute, nonetheless found "it best to defer to the implicit holding of the South Dakota Supreme Court in State v. Onihan that the 1961 legislation remains an effective state statute notwithstanding its checkered history." Rosebud Sioux Tribe, 709 F. Supp. at 1509 (citations omitted). In doing so the

district court noted that Hankins was wrongly decided and that the 1961 legislation was a sufficient "affirmative legislative action" of the state to allow assumption of PL 280 jurisdiction. Id. at 1510-12. On this basis the district court concluded that the 1968 tribal consent requirement was not applicable. Id. at 1513.

The validity of the state's jurisdiction presents difficult questions due to the unique sequence of events in this case. The Onihan court concluded that Hankins was essentially overruled by Yakima. We recognize the South Dakota Supreme Court's prerogative to declare its earlier decisions overruled, invalid or no longer possessing binding effect. However, were a state court's ruling is affected by its interpretation of federal law, this court may conduct a de novo review of that interpretation. See Three Affiliated Tribes,

467 U.S. at 153-54 (federal court can review state court decision influenced by its understanding of federal law).

It is important to distinguish between the state and federal law issues facing the Onihan court. The state law question concerns procedural compliance with PL 280, i.e., the procedure for removing a constitutional disclaimer. See, e.g., S.D. Const. art. XXII; see Yakima, 439 U.S. at 493 (procedure for removing disclaimers is state law issue). The federal law question considers substantive compliance with PL 280, i.e., is the jurisdiction statute sufficient to accept Congress' offer of jurisdiction over Indians. The Onihan court addressed both issues in its decision. That court considered the remaining validity of Hankins in light of Yakima, overruled its prior decision, and then, applying Yakima retroactively, concluded that the 1961

legislation complied with the substantive requirements of PL 280. Onihan, 427 N.W.2d at 367-68. We address the issue of the substantive validity of the state's assertion of jurisdiction since it is for the federal court to determine whether a state's legislation complies with the federal requirements of PL 280. See, e.g., Tyndall v. Gunter, 840 F.2d 617, 618 (8th Cir. 1988) (validity of retrocession of PL 280 jurisdiction is a federal law question); Omaha Tribe of Nebraska v. Village of Walthill, 334 F. Supp. 823, 831 (D. Neb. 1971) (validity of state resolution retroceding PL 280 jurisdiction considered under federal law), aff'd, 460 F.2d 1327 (8th Cir. 1972).

The South Dakota Supreme Court misinterpreted Yakima as controlling, and thus overruling its earlier decisions holding the state did not have PL 280 jurisdiction.

We find error in this interpretation of Yakima. The differences between Washington's jurisdiction scheme and South Dakota's single subject-matter jurisdiction scheme require a more searching examination. Washington's statute assumed jurisdiction over eight different subject-matter areas,[7] and left open the possibility of full jurisdiction

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[7] See Yakima, 439 U.S. at 475-76:

> Full criminal and civil jurisdiction to the extent permitted by Pub. L. 280 was extended to all fee lands in every Indian reservation and to trust and allotted lands therein when non-Indians were involved. Except for eight categories of law, however, state jurisdiction was not extended to Indians on allotted and trust lands unless the affected tribe so requested. The eight jurisdictional categories of state law that were thus extended to all parts of every Indian reservation were in the areas of compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and motor vehicles.

with the consent of the affected Tribe. The Yakima court found the state could "assume jurisdiction in such manner" as the people of the state shall "by affirmative legislative action, obligate and bind the State to assumption thereof." Yakima, 439 U.S. at 495. The court also observed: "Whether or not "[sic] in such manner"[sic] is fully synonymous with "[sic] to such extent,"[sic] the phrase is at least broad enough to authorize a State to condition the extension of full jurisdiction over an Indian reservation on the consent of the tribe affected." Id. at 498 (emphasis added).

The Yakima court concluded that Washington's jurisdiction statute did not represent "an attempt to reap the benefits and to avoid the burdens of the jurisdictional offer made by Congress." Id. at 498. As Yakima points out proof to the contrary was found in the state's offer to

assume total jurisdiction whenever a tribal request is made that it do so.[8] Washington's

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[8]The Supreme Court expanded on this theme by observing:

> [T]he partial geographic and subject-matter jurisdiction that exists in the absence of tribal consent is responsive to the law enforcement concerns that underlay the adoption of Pub. L. 280. State jurisdiction is complete as to all non-Indians on reservations and is also complete as to Indians on nontrust lands. The law enforcement hiatus that preoccupied the 83d Congress has to that extent been eliminated. On trust and restricted lands within the reservations whose tribes have not requested the coverage of state law, jurisdiction over crimes by Indians is, as it was when Pub. L. 280 was enacted, shared by the tribal and Federal Governments. To the extent that this shared federal and tribal responsibility is inadequate to preserve law and order, the tribes need only request and they will receive the protection of state law.
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> * * * *
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> We are unable to conclude that the State, in asserting a less intrusive presence on the Reservation while at the

(Footnote Continued)

scheme was responsive to the congressional concerns and intent that fostered PL 280 and left "substantial play for tribal self-government" in a way that "reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation." Id. at 499.

In contrast, South Dakota's jurisdiction scheme assumes civil and criminal

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(Footnote Continued)

> same time obligating itself to assume full jurisdictional responsibility upon request, somehow flouted the will of Congress. A State that has accepted the jurisdictional offer in Pub. L. 280 in a way that leaves substantial play for tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation, has plainly taken action within the terms of the offer made by Congress to the States in 1953. For Congress surely did not deny an option State the power to condition its offer of full jurisdiction on tribal consent.

Id. at 498-99.

jurisdiction over one limited area: highways, a subject-matter area that "arguably takes jurisdiction over perhaps the only part of law enforcement which comes close to being self-financing - i.e., enforcement of traffic laws." Rosebud Sioux Tribe, 709 F. Supp. at 1508.[9] The remainder of the 1961 amendment was an attempt to condition full jurisdiction over Indian lands on federal reimbursement.[10]

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[9]The Tribes question the extent of the state's presence on the highways. Current litigation in South Dakota courts challenges the authority of the state, under the 1961 legislation, to enforce compulsory insurance laws against Indians traveling on reservation highways, and the state's authority to proceed beyond the geographic boundary of its jurisdiction, highways, to arrest a tribal member for a traffic offense.

[10]In commenting on the negative impact of the 1961 legislation, a legislative research staff report pointed out that the 1961 law "allowed assumption of total jurisdiction if the federal government

(Footnote Continued)

The major concerns reflected in the passage of PL 280 were (1) to reduce the economic burden of federal jurisdiction over reservations, (2) to respond to a perceived hiatus in law enforcement on reservations, and (3) to assimilate Indians into the general population. Yakima, 439 U.S. at 498.

We believe South Dakota's limited excursion into the area of Indian jurisdiction is not responsive to the concerns underlying the passage of PL 280. Jurisdiction over highways does not go very far in reducing lawlessness on reservations, but simply introduces a third party to the already complex jurisdiction pattern on

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(Footnote Continued)
assumed all costs involved. However, the federal government has not done this, and there appears to be almost no chance that it will." Staff Report, Jurisdiction Over Indian Country in South Dakota, at 7 (S.D. Legis. Research Council, Mar. 5, 1964).

reservations.[11] It also does little to

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[11]There was no shown hiatus in law enforcement on highways within the reservation, but such a hiatus clearly existed in other areas of the law. See Staff Report, supra at 7: "The Interim Investigating Committee subsequently concluded that lack of jurisdiction in the matters of juvenile affairs, domestic relations and institutional commitments in Indian Country seriously hindered the efficient operation of public welfare programs." As the report further points out, there already existed sharing agreements affording some state control over the highways.

> As a practical matter, despite the Hankins ruling, South Dakota does maintain some control of law and order on the public highways running through Indian reservations, through agreements on procedures among the respective tribal councils, the U.S. Bureau of Indian Affairs, and the office of the State Attorney General representing the Highway Patrol. Under these agreements, in order to eliminate legal questions of jurisdiction, highway patrolmen and tribal agents are "cross-commissioned" so their power of arrest cannot be challenged in court. The patrolmen police the highways as they do elsewhere in the state. Indians arrested by them

(Footnote Continued)

reduce federal presence on reservations since the federal government retains the financial burden of the majority of jurisdictional concerns. The Washington statute, which left open the possibility of complete jurisdiction upon tribal consent, reflected an acceptance of the burden of jurisdiction, as well as an attempt to accommodate tribal self-governance. The state's partial jurisdiction assumption here represents the contrary result.[12] We believe that the failure to assume jurisdiction in a manner consistent with the purposes of PL 280 is not

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(Footnote Continued)
are turned over to tribal courts; non-Indians will be tried in state courts.

Id.

[12]South Dakota urges here on appeal, contrary to the district court's findings, that the Tribes should not even share in concurrent jurisdiction.

sufficient "action within the terms of the offer made by Congress to the States in 1953." Yakima, 439 U.S. at 499. See also Bryan v. Itasca County, 426 U.S. 373, 383-85 (1976) (state not allowed to tax Indians on reservations since PL 280's grant of civil jurisdiction was not intended to allow states to impose regulatory laws on Indians); Kennerly v. District Court of Montana, 400 U.S. 423, 427 (1971) (requirements of PL 280 must be strictly followed).

There exists a second and even more compelling reason for rejecting the state's partial assumption of jurisdiction as complying with PL 280. We find that the intent of Congress in 1968 in amending PL 280 to eliminate nonconsensual assumptions of jurisdiction prevents the state from attempting to assume jurisdiction through retroactive application of a new statutory interpretation.

We find support for this conclusion in the purposes that fueled the tribal consent amendment to PL 280. Congress signaled the adoption of a new policy regarding the relationship between Indians and federal and state governments that is reflected in the 1968 amendment, and which we believe cannot be defeated by the retroactive application of a change in statutory interpretation. PL 280 had been the subject of criticism for its failure to include a provision allowing affected Tribes a voice in determining which system of government would regulate them. See F. Cohen, Handbook of Federal Indian Law 177 (1983) (President Eisenhower signed PL 280, but requested Congress immediately amend the statute to include a tribal consent provision). Members of several different tribes consistently and continuously voiced their objection to the lack of a tribal consent provision in PL 280. See Hearings on

H.R. 15419 And Related Bills Before the Subcommittee on Indian Affairs of the House Committee on Interior & Insular Affairs, 90th Cong., 2d Sess. 27 (1968).[13] The 1968 tribal consent amendment was a reflection of the principle that leaders must obtain the consent of those to be governed before assuming power. See Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 1st Sess. 4 (1965) (statement of Sen. McGovern). This amendment also reflected the shift in national policy toward Indians, from an

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[13]The Indians' objection to nonconsensual assumptions of jurisdiction was based on a belief in tribal sovereignty; a fear of discriminatory operation of state jurisdiction; and disagreement with the ouster of functioning systems of tribal government. See Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 UCLA L.Rev. 535, 544-45 (1975).

assimilationist approach, to a policy promoting tribal self-governance and self-reliance. Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 UCLA L.Rev. 535, 550 (1975).

Significantly, several representatives of South Dakota appeared before the congressional committee considering the amendment, and pronounced their support for a tribal consent provision. These representatives also described South Dakota as a non-PL 280 state, and declared that South Dakota accepted the principle that tribal consent was an important feature of a democratic system of government. See Hearings Before the Subcommittee of Constitutional Rights, supra (statement of South Dakota Assistant Attorney General Andre); Hearings on H.R. Res. 1100 Before the Committee on Rules of the House of

Representatives, 90th Cong., 2d Sess. 2741 (1968) (statement of South Dakota Congressman Reifel). We cannot rely solely upon the statements of these representatives to find a congressional intent that South Dakota be bound by this amendment. We do believe, however, that the entire history of this amendment, including the representations made by these speakers, provides ample support for the conclusion that Congress intended to eliminate completely the ability of a state to assume jurisdiction, without tribal consent, at any time and in any manner after 1968.

We find further support for this conclusion in the repeal of the original section 7 of PL 280, which had allowed assumptions of jurisdiction without consent. It is clear that Congress intended to eliminate the possibility of future nonconsensual assumptions of jurisdiction by

repealing the section under which such jurisdiction was obtained. This repeal did not affect those assumptions of jurisdiction that were already operative. See Act of Apr. 11, 1968, Pub. L. 90-284, Title IV, § 403(b), 82 Stat. 73, 79 (codified at 25 U.S.C. § 1323(b)). But the clear import of the repeal of section 7 was to signal Congress' disapproval of any further nonconsensual assumptions of jurisdiction, through any means.

We acknowledge the existence of the rule of law requiring a change in statutory interpretation to be applied retroactively. See United States v. Estate of Donnelly, 397 U.S. 286, 294-95 (1970); McDonald v. Watt, 653 F.2d 1035, 1042 (5th Cir. Unit A Aug. 1981); Ettinger v. Central Penn Nat'l Bank, 634 F.2d 120, 124 (3d Cir. 1980); Safarik v. Udall, 304 F.2d 944, 949-50 (D.C. Cir.), cert. denied sub nom., 371 U.S. 901 (1962);

Jackson v. Harris, 43 F.2d 513, 516 (10th Cir. 1930). This rule explains that "[t]he effect of the subsequent decisions is not to make a new law but only to hold that the law always meant what the court now says it means." Fleming v. Fleming, 264 U.S. 29, 31-32 (1924). This rule must be evaluated, however, in light of the unique factual circumstances of this case, particularly the background leading up to the intervening congressional amendment.[14]

Although in a different context[15] the observation of the Supreme Court in Chicot

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[14]Professor Calabresi has observed that the review of old statutes requires consideration of post-enactment changes to determine "how the statute fits in the current legal fabric and * * * what has happened to that fabric since the statute was passed." G. Calabresi, A Common Law for the Age of Statutes 129 (Harv. Univ. Press 1982).

[15]In Chicot County the court was

(Footnote Continued)

County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), concerning the retroactive application of a decision holding a statute unconstitutional is relevant here. The court stated:

> The actual existence of a statute, prior to [a determination of unconstitutionality] is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in

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(Footnote Continued)
concerned with the collateral attack of an earlier judgment, and principles of res judicata. The Bank brought suit to recover against bonds on which the drainage district had defaulted. The district pled as res judicata an earlier judgment approving a plan of readjustment, which barred debts, such as the Bank's, that had not been presented in the debt readjustment proceedings. The Bank attacked the validity of that judgment since a different court had ruled unconstitutional the statute under which the earlier court had acted. 308 U.S. at 372-74. The court ruled that, notwithstanding the subsequent determination of unconstitutionality, the validity of the earlier judgment was not open to collateral attack. Id. at 376-77.

> various aspects,-with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

Id. at 374 (emphasis added).

The Chicot County court enunciated principles of non-retroactivity which we believe are applicable here. A decision overruling a previous construction of a statute is not given retroactive application where to do so disturbs the vested rights of the parties. See Massaglia v. Commissioner, 286 F.2d 258, 259 (10th Cir. 1961); see also Northern Pipeline Constr. Co. v. Marathon

Pipe Line Co., 458 U.S. 50, 87-88 (1982) (denying retroactive effect to decision where retroactive application would "visit substantial unjustice and hardship" upon litigants who relied on overruled provisions of Bankruptcy Act); Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971) (retroactive application should be denied where substantially unequitable result occurs). We believe the Tribes had a vested right in the protection offered by the 1968 tribal consent amendment. A party does not, of course, have a vested right in a judicial decision, Estate of Donnelly, 397 U.S. at 295;[16] however, the

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[16]The Supreme Court pointed out in Estate of Donnelly that the government is entitled to follow what it believes is the correct interpretation of a statute, "and to reap the benefits of that adherence if it proves to be correct[.]" Id. at 294. The Court retroactively applied a change of law in Estate of Donnelly in part because of the (Footnote Continued)

Tribes' vested right here extends not from the ruling in Hankins but from the change in Congress' offer of jurisdiction to the states.

The Supreme Court has considered subsequent "jurisdictional history" in resolving claims of jurisdiction over Indians. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 603-05 (1977); DeCoteau v. District County Court, 420 U.S. 425, 442-43 (1975). In Rosebud Sioux Tribe, which involved the disestablishment of reservation land, the Court supported its conclusion that earlier congressional acts disestablished the

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(Footnote Continued)
government's adherence to the position the Supreme Court eventually adopted. Id. at 295. Here, however, the state not only did not adhere to its claim of jurisdiction, it acquiesced in the Hankins ruling as demonstrated by the position it took during the congressional hearings on the tribal consent amendment.

reservation by reviewing the longstanding pattern of jurisdiction over the land.

> Since state jurisdiction over the area within a reservation's boundaries is quite limited, the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as part of the "jurisdictional history." The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian * * * not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges.

430 U.S. at 603-05 (citations, footnotes omitted) (emphasis added). We believe retroactive application in this case would disrupt the Tribes' "justifiable expectations."

The Tribes, particularly in South Dakota, have relied on the protection offered by the tribal consent amendment since 1968.

The Tribes have co-existed with state authorities with the knowledge that the state could not assume jurisdiction over them without their consent. The state allowed federal and tribal authorities to exercise jurisdiction prior to and after 1968 without asserting its claim to jurisdiction. Retroactive application of the Yakima interpretation of PL 280 to revive South Dakota's 1961 legislation would disregard the manner in which the Tribes and the state have structured their jurisdictional relationship.

The Supreme has consistently instructed that ambiguities in legislation affecting retained tribal sovereignty must be construed in favor of the Indians. Yakima, 439 U.S. at 484; see also Bryan v. Itasca County, 426 U.S. at 386 (construing effect of legislation affecting Indians in light of "intervening legislative enactments"). This rule of construction becomes crucial when the effect

of a retroactive statutory interpretation is considered.

There is no question that in the enactment of the tribal consent requirement the Tribes were provided a vested interest in self-government and were afforded congressional assurance that jurisdiction not previously assumed by the state could not be taken from them without their consent. At the time this amendment was passed the legislative history demonstrates that both the state and the Tribes announced that no jurisdiction had been assumed by the state prior to the 1968 amendment. We cannot ignore the dramatic shift in national policy toward Indians that is reflected by the tribal consent amendment. To allow the state's claim of jurisdiction would defeat the purpose of the 1968 amendment, and disregard the manner in which the parties have structured their relationship. South

Dakota cannot take advantage of a change in statutory construction without also recognizing the intervening legislation imposing new prerequisites on assumptions of jurisdiction. Since South Dakota has not obtained the consent of the Tribes since 1968, its claim of jurisdiction, made only since the advent of Washington v. Yakima Indian Nation in 1979, is invalid.

In sum we hold that (1) the 1961 legislation did not validly provide for State jurisdiction over the highways within the terms of PL 280; (2) that the self-governmental interests of the Tribes had become vested at the time of the passage of the 1968 amendment and that it was improper to apply Yakima retroactively to hold that state jurisdiction had been assumed prior to the repeal of section 7 of PL 280 in 1968; and (3) that the congressional intent in passing the 1968 amendment did not

contemplate that a subsequent, retroactive application of a change in statutory interpretation could alter South Dakota's lack of jurisdiction existing at the time of the repeal of section 7.

The judgment of the district court is vacated and judgment in favor of the plaintiffs in accord with this opinion is to be entered; the cross-appeal is ordered dismissed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 89-5227/5228/5252SD

Rosebud Sioux Tribe, et al.,	*	
	*	Order Denying
Appellants,	*	Petition for
	*	Rehearing and
v.	*	Suggestion for
	*	Rehearing en Banc
State of South Dakota et al.,	*	
	*	
Appellees.	*	

Appellees' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judges Fagg, Bowman, Magill and Beam would have voted to grant the petition for rehearing.

Petition for rehearing by the panel is also denied.

June 8, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 575091

March 31, 1989

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RE: CIVIL NO. 86-3019
ROSEBUD SIOUX TRIBE, Plaintiff;
CHEYENNE RIVER SIOUX TRIBE,
Plaintiff/Intervenor; OGLALA
SIOUX TRIBE, Plaintiff/Intervenor;
STANDING ROCK SIOUX TRIBE,
Plaintiff/Intervenor
vs.
STATE OF SOUTH DAKOTA,
GEORGE S. MICKELSON, Governor;
ROGER TELLINGHUISEN, Attorney
General; JIM JONES, Superintendent
of the Highway Patrol, In Their
Official Capacities, Defendants.

Dear Counsel:

MEMORANDUM OPINION

On May 14, 1986, the Rosebud Sioux Tribe filed this action against defendants, the State of South Dakota and various state

officials (hereinafter "the State" or "South Dakota") to seek declaratory and injunctive relief restraining South Dakota from exercising jurisdiction over Indians on highways within the Rosebud Indian Reservation. The Rosebud Sioux Tribe invokes the jurisdiction of this Court under 28 U.S.C. §§ 1331, 1343(3) and (4), 1337, 1362 and 42 U.S.C. § 1983. This Court has permitted the Cheyenne River Sioux Tribe, Oglala Sioux Tribe, and Standing Rock Sioux Tribe to join as plaintiff-intervenors under Rule 24 of the Federal Rules of Civil Procedure. Based on an agreement filed by the parties to this case, this Court on November 19, 1987 ordered that the parties submit the case for decision on the merits by filing cross-motions for summary judgment. Having reviewed the lengthy original and supplemental briefing of the cross-motions for summary judgment and having carefully

considered the issues, this Court denies the summary judgment motion filed by the tribal plaintiffs and grants summary judgment in favor of the State.

I. FACTS

The essential facts in this case are not in dispute. The plaintiffs are federally recognized Indian tribes who sue as sovereign governmental entities and as parens patriae on behalf of tribal members. Each of the tribal plaintiffs presently patrols and enforces traffic laws on roads within their respective reservations. Each tribe has tribal courts, law enforcement officers and detention facilities. The tribes assert that with regard to offenses committed by Indians on roads within the reservations, the United States has exclusive jurisdiction over major crimes and the tribes have exclusive jurisdiction over other crimes.

Defendant South Dakota and its officials assert the authority to enforce state laws on all individuals on highways within the reservations. On several occasions, the State has arrested Indians on roads within Indian country for violating state laws.[17] The tribes have brought this suit to contest state jurisdiction over Indians on roads

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[17]This Court is aware of three such cases: State v. Medearis, No. 85-26, slip op. (6th Judicial Cir. S.D., Jan. 21, 1986); State v. Onihan, Crim.No. 86-168, slip op. (5th Judicial Cir. S.D., May 27, 1987), aff'd, 427 N.W.2d 365 (S.D. 1988); and State v. Cloud, slip op. (5th Judicial Cir. S.D., March 24, 1987). An opinion issued in State v. Goodnick, No. 85-19, slip op. (6th Judicial Cir. S.D., January 15, 1986), though the case involved a non-Indian defendant, held that South Dakota has jurisdiction over offenses committed by non-Indians and Indians alike on highways within Indian reservations. Onihan and Cloud involved prosecutions for drunk driving, while Goodnick involved both drunk driving and vehicular manslaughter charges. In Medearis, the defendant was charged with violating a state statute limiting the weight of certain vehicles driven on highways.

within Indian reservations. To resolve the case, this Court must examine the unique and complex history of jurisdiction over Indians in South Dakota.

II. HISTORICAL DEVELOPMENT OF SOUTH DAKOTA JURISDICTION OVER INDIANS

A. The Organic Law Disclaimer

The Enabling Act passed by Congress to permit South Dakota, North Dakota, Montana, and Washington to enter the Union required each state to disclaim jurisdiction in Indian country. Section 4 of the Enabling Act provided:

> [T]he people inhabiting said proposed States **do agree and declare** that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control

> of the Congress of the United States.

Act of February 22, 1889, ch. 180, § 4, 25 Stat. 676.[18]

In accordance with the Enabling Act, South Dakota incorporated the jurisdictional disclaimer as a compact with the United States in Article XXII of the state constitution. Article XXII, which remains as a part of the current South Dakota Constitution, states:

> [W]e, the people inhabiting the state of South Dakota, **do agree and declare** that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by

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[18]Congress also required disclaimers of state jurisdiction over Indians in the enabling acts of Utah, Oklahoma, Arizona and New Mexico. See Act of July 16, 1894, ch. 138, 28 Stat. 107 (Utah); Act of June 16, 1906, ch. 32335, 34 Stat. 267 (Oklahoma); Act of June 20, 1910, ch. 310, 36 Stat. 557 (Arizona and New Mexico).

> any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

Under the 1889 Enabling Act, Article XXII of the South Dakota Constitution, and federal case law, South Dakota traditionally has exercised criminal or civil jurisdiction in Indian country only when Indians were involved. See generally St. Cloud v. United States, 702 F. Supp. 1456, 1459-60 (D.S.D. 1988) (South Dakota would have criminal jurisdiction over rape on reservation only if both victim and assailant were non-Indians); White v. Califano, 437 F. Supp. 543 (D.S.D. 1977), aff'd, 581 F.2d 697 (8th Cir. 1978) (federal rather than South Dakota court has jurisdiction in civil case for commitment of mentally ill Indian on reservation); see

generally Williams v. Lee, 358 U.S. 217, 218-22 (1959).

B. Public Law 280

In 1953, Congress saw fit to alter its compact with disclaimer states by passing legislation known as Public Law 280. Act of Aug. 15, 1953, 67 Stat. 588-590 (codified in part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360). Public Law 280 was passed during an era when Congress sought to diminish the federal trust responsibility to Indian tribes by terminating federal recognition of certain Indian tribes and encouraging assimilation of Indians into white society. Congress by passing Public Law 280 expressly ceded criminal and civil jurisdiction over Indian country to California, Minnesota, Nebraska,

Oregon, and Wisconsin.[19] Public Law 280 gave all other states the option to assume civil and criminal jurisdiction in Indian country, even if the state had an organic law disclaimer of jurisdiction in Indian country as does South Dakota. The two sections of Public Law 280 that apply to South Dakota are sections six and seven,[20] which as originally enacted, stated:

> § 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or

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[19]Public Law 280 exempted a few tribes in these five states from complete state jurisdiction. Congress later added Alaska as a state with "mandatory" Public Law 280 jurisdiction over Native Americans. See 18 U.S.C. § 1162(a) and 28 U.S.C. § 1360(a).

[20]The Supreme Court in Washington v. Yakima Indian Nation, 439 U.S. 436 (1979) ruled that both sections six and seven apply to states with organic law disclaimers like South Dakota. Id. at 496-97.

existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

§ 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislation, obligate and bind the State to assumption thereof.

C. South Dakota Legislation

In 1957, the South Dakota legislature enacted Chapter 319 of the Session Laws of 1957 to assume jursidiction [sic] over Indian country within South Dakota. The Act in section one purported to accept complete criminal and civil jurisdiction over Indian

country within the State, but sections four and five of the Act conditioned the assumption of jurisdiction on tribal consent and approval by the Board of County Commissioners of any county containing Indian country.[21] These conditions were not met, so

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[21]The relevant provisions of Chapter 319 of the 1957 Session Laws stated:

> Section 1. In accordance with the provisions of 67 statutes at large, page 589, Public Law 280, and as Indian Country is defined by Title 18 USCA, Section 1151, the provisions of Chapter 106 of the Session Laws of the State of South Dakota for 1901, as amended, or any law to the contrary, notwithstanding, the state of South Dakota assumes and accepts jurisdiction of all criminal and civil causes of action arising in Indian Country under the provisions of this Act as hereinafter set forth.
>
> Section 4. Jurisdiction shall not be deemed assumed or accepted by this state in any county of South Dakota unless and until a resolution assuming and accepting the same is adopted by the Board of County Commissioners of any

(Footnote Continued)

this enactment never became operative. See In Re Petition of High Pine, 78 S.D. 121, 129, 99 N.W.2d 38, 41 (1959).

In 1959, the South Dakota legislature passed a statute assuming jurisdiction over highways within Indian country built jointly by the state and federal governments.[22] This

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(Footnote Continued)
county containing Indian Country.

> Section 5. Be it further provided that no assumption of civil or criminal jurisdiction shall become effective under the provisions of this Act until the Tribal council of a Tribe over which state jurisdiction is to be taken, shall have considered a referendum in which all persons eligible to vote at elections held for the purposes of electing officers of such Tribe, shall have been given an opportunity to approve or disapprove such assumption of jurisdiction.

[22]This statute stated:

> The United States of America having ceded to the state of South Dakota concurrent police jurisdiction excepting the ten major crimes as defined by 18

(Footnote Continued)

section, codified at SDCL § 1-1-17, was short-lived, as legislation passed in 1961 repealed the 1959 legislation.

The state enactment most critical to a decision in this case came in 1961 when the South Dakota legislature passed chapter 464 of the Session Laws of 1961 [hereinafter

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(Footnote Continued)

> USC section 1153, unless automobile accidents are involved, over all public highways or portions thereof, including rights-of-way, located within the state of South Dakota:
>
> > (1) Which are established through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian, under any laws or treaties, but which have not been conveyed to the allottee with full power of alienation, and;
> > (2) Which were established or which are maintained by the joint participation of the United States and the state of South Dakota.
>
> The state of South Dakota hereby accepts such jurisdiction.

SDCL § 1-1-17.

"1961 Act" or "1961 legislation"]. The 1961 legislation sought to authorize broad state jurisdiction over Indians, but only if the State could obtain funds from the federal government to defray the costs of law enforcement on reservations. During this era, South Dakota was reluctant to accept unqualified jurisdiction in Indian country primarily due to financial concerns.

The two most pertinent sections of the 1961 legislation provided:

> Section 1. [codified at SDCL § 1-1-18] The State of South Dakota, in accordance with the provisions of 67 Statutes at large, page 589 (Public Law 280), hereby assumes and accepts jurisdiction of all criminal offenses and civil causes of action arising in the Indian Country located within this State as Indian Country is defined by Title 18 United States Code Annotated, section 1151, and obligates and binds this State to the assumption thereof.
>
> Section 4. [codified at SDCL § 1-1-21] Except as to criminal offenses and civil causes of action arising on any highways, as the

> term is defined in chapter 31-1,[23] the jurisdiction provided for in Section 1 herein shall not be deemed assumed or accepted by this State, . . . unless and until the Governor of the State of South Dakota, if satisfied that the United States of America has made proper provisions for the reimbursement to this State and its counties for the added costs in connection with the assumption of said jurisdiction, has issued his proper proclamation duly filed with the Secretary of State declaring the said jurisdiction to be assumed and accepted.

The governor, however, never filed the proclamation required by section four, so the generalized assumption of jurisdiction did not take place. Nevertheless, it is on section four of this Act that South Dakota

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[23] SDCL § 31-1-1 states in part: Every way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel, is a highway. The term "highway" shall not be deemed to include a roadway or driveway upon grounds owned by private persons, colleges, universities, or other institutions . . . .

bases its assertion of jurisdiction over Indians on highways within Indian country. The State reads section one together with the exception clause of section four, now codified at SDCL § 1-1-21, to authorize state jurisdiction over Indians on reservation highways regardless of whether the governor satisfied the condition in section four of obtaining adequate funding from the federal government.

In 1963, the South Dakota legislature passed yet another statute, this time seeking to accept unconditionally jurisdiction in Indian country. This legislation also purported to repeal the 1961 Act. The 1963 legislation, however, was appropriately referred to a vote of the people of South Dakota. In the 1964 general election, South Dakota rejected the 1963 Act by a vote of 201,389 to 58,289 after Indian tribes lead [sic] a concerted publicity campaign against

the 1963 law. See White v. Califano, 437 F. Supp. 543, 563 (D.S.D. 1977), aff'd, 581 F.2d 697 (8th Cir. 1978); R. Clow, State Jurisdiction on Sioux Reservations: Indian and Non-Indian Responses, 1952-1964, 11 S.D.L. Rev. 171, 176-183 (1966). Under South Dakota law, the 1963 legislation never became effective since it was duly referred to a vote of the people and soundly defeated.

D. In Re Petition of Hankins

The argument of the State that the exception clause of section 4 of the 1961 Act authorizes state jurisdiction on reservation highways was initially made before the Supreme Court of South Dakota to support the 1962 state court conviction of an Indian for drunken driving on an Indian reservation. In In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964), the South Dakota Supreme Court confronted essentially the same question that this case presents: whether

the 1961 legislation is an effective assumption of state jurisdiction over Indians on roads within Indian country. The court in Hankins concluded that Public Law 280 did not permit South Dakota to assume partial jurisdiction in Indian country over highways alone. The court also stated that partial state jurisdiction under the 1961 Act did not serve the purposes of Public Law 280 and would further complicate questions of who had jurisdiction over Indians. Thus, the court held that the 1961 Act was insufficient to take Public Law 280 jurisdiction and that the state lacked jurisdiction over an Indian driving while intoxicated on a highway within a reservation. Id. at 442-43, 125 N.W.2d at 843.

The South Dakota Supreme Court in a number of cases in the next fifteen years reaffirmed the holding in Hankins. For instance, in Smith v. Temple, 82 S.D. 650,

152 N.W.2d 547 (1967), the court held that South Dakota had no jurisdiction over a suit by one Indian against another Indian arising out of an automobile accident on a highway in Indian country. In Smith, the court stated:

> [T]his state has not effectively, affirmatively, and unequivocally acted to assume jurisdiction in the manner specified in [Public Law 280], therefore . . . criminal jurisdiction over Indians for crimes committed within Indian territory in South Dakota is exclusively vested in the Federal and Tribal courts.

Id. at 548. See also State v. Molash, 86 S.D. 558, 199 N.W.2d 591, 593 (1972); State v. Hero, 282 N.W.2d 70, 72 (S.D. 1979) (South Dakota is not a Public Law 280 state). In addition, even the State took the position in litigation during the late 1960s and the 1970s that it had no jurisdiction over actions on Indian lands. See, e.g., State v. White Horse, 89 S.D. 196, 197-98, 231 N.W.2d 847, 848 (1975) (state stipulates to no

jurisdiction over an Indian drunk driver in Indian country).[24]

E. The Indian Civil Rights Act

Meanwhile, the congressional policy toward Indian tribes shifted in the 1960s from a policy promoting assimilation and termination of federal supervision to a renewed interest in encouraging tribal self-governance and self-reliance. Concomitant with this policy change, Congress enacted in 1968 the Indian Civil Rights Act

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[24]Additionally, in hearings before a congressional subcommittee reviewing Indian law, a representative of the office of the Attorney General of South Dakota stated that "South Dakota never assumed jurisdiction in Indian country." Statement of Walter W. Andre, Assistant Attorney General, State of South Dakota before the Subcommittee on Constitutional Rights of the Senate committee on the Judiciary, Constitutional Rights of American Indian Hearings on S.961-68, S.J. Res. 40, U.S. Senate, 89th Cong., 1st Sess. (1965) at 118) [sic].

(ICRA).[25] Part of the ICRA amended Public Law 280 to require tribal consent as expressed by a majority vote of enrolled adult tribal members before a state could assume further criminal or civil jurisdiction over Indians. The ICRA also authorized partial assumptions of state jurisdiction and left undisturbed state jurisdiction assumed from 1953 to 1968 under the original language of Public Law 280.

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[25]The Indian Civil Rights Act, 82 Stat. 78, is codified at 25 U.S.C. §§ 1321-26.

By 1968, both states and tribes had become dissatisfied with provisions of Public Law 280. Tribes resented that states could unilaterally force state jurisdiction on tribes against the will of the Indian people, and the states disliked the way remaining federal protections seemed to deprive them of the ability to finance their newly acquired powers. Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 538 (1975).

F. Washington v. Yakima Indian Nation

An important event in the development of the dispute in this case occurred in 1979 when the United States Supreme Court decided Washington v. Yakima Indian Nation, 439 U.S. 463 (1979). In Yakima Indian, the Court considered whether the State of Washington properly assumed Public Law 280 jurisdiction through a 1963 statute which took jurisdiction over eight subject matter areas and agreed to accept full jurisdiction upon the consent of individual tribes. The tribes in Yakima Indian challenged Washington's partial assumption of jurisdiction by advancing three arguments: 1) Washington had to amend its constitution before assuming Public Law 280 jurisdiction because Washington had an organic law disclaimer of jurisdiction in Indian country; 2) Public Law 280 did not permit the extension of partial state jurisdiction; and 3) the

Washington statute violated the equal protection and due process guarantees of the Fourteenth Amendment. Id. at 466-67. After a careful examination of Public Law 280, the Court rejected each of these contentions. Because the Washington legislature passed the statute at issue in 1963, the Court scrutinized the Washington statute under the original language of Public Law 280 rather than under the modifications to Public Law 280 contained in the 1968 enactment of the ICRA. Id. at 493 n.40. The Court observed that Congress in 1953 intended Public Law 280 to facilitate and not to discourage the transfer of jurisdiction, id. at 490, and determined that both sections six and seven of the original language of Public Law 280 apply to states with organic law disclaimers of jurisdiction in Indian country, like Washington or South Dakota, id. at 496-97. The Court concluded that

Washington's partial assumption of jurisdiction over Indians was not inconsistent with Public Law 280.

Yakima Indian reveals that the South Dakota Supreme Court in In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964) misinterpreted provisions of Public Law 280 in two important respects. First, the court in Hankins wrongly concluded that Public Law 280 did not permit a partial assumption of jurisdiction in Indian country. Second, the court mistakenly determined that only section six -- rather than both sections six and seven -- of the original version of Public Law 280 applied to South Dakota. These two flaws in Hankins severely erode the reasoning and holding in Hankins that the 1961 legislation was insufficient to empower South Dakota to enforce state law on Indians on highways within Indian country.

The State argues that the analysis in Yakima Indian alone disposes of this case. The State, however, overlooks several troublesome distinctions between this case and Yakima Indian. First, the Washington statute in Yakima Indian provided a procedure whereby tribes could consent to complete state jurisdiction in addition to unilaterally assuming partial jurisdiction over the following eight subject matters: 1) compulsory school attendance; 2) public assistance; 3) domestic relations; 4) mental illness; 5) juvenile delinquency; 6) adoption proceedings; 7) dependent children; and 8) operation of motor vehicles upon public streets, alleys, roads and highways. Washington v. Yakima Indian Nation, 439 U.S. 463, 465 n.1 (1979). In rejecting an argument by the United States on behalf of the tribe that Washington's assumption of partial jurisdiction was inconsistent with

the goals of Public Law 280, the Court reasoned:

> [The Washington law] does not reflect an attempt to reap the benefits and to avoid the burden of the jurisdictional offer made by Congress. To the contrary, the State must assume total jurisdiction whenever a tribal request is made that it do so.

Indeed, with the possible exception of highway jurisdiction which might yield revenue through fines from violations of traffic laws, the eight areas in which Washington assumed jurisdiction hardly reaped benefits for the state while averting burdensome responsibilities. By contrast, the assumption of jurisdiction by South Dakota solely over reservation roads without offering complete jurisdiction upon tribal consent arguably takes jurisdiction over perhaps the only part of law enforcement which comes close to being self-financing -- i.e, [sic] enforcement of traffic laws.

The second distinction between Yakima Indian and the instant case is that the South Dakota statute at issue provides a far more questionable basis for Public Law 280 jurisdiction than did the Washington enactment. The 1961 South Dakota legislation was ruled ineffective in In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964), and then went some two decades without being enforced. In addition, the 1961 Act indirectly assumes jurisdiction through a clause excepting highway jurisdiction in Indian country from a section making federal government financing a prerequisite to complete assumption of state jurisdiction in Indian country. The Washington statute at issue in Yakima Indian not only lacked the checkered history of the 1961 Act, but also was substantially more straightforward. Consequently, Yakima Indian alone does not resolve this case, as the state contends.

G. State v. Onihan

Since Yakima Indian severely undermined the reasoning in Hankins, South Dakota after Yakima Indian reevaluated whether the 1961 legislation was an effective grant of state highway jurisdiction in Indian country. The 1961 Act, though never repealed, was omitted from the 1974 revision of the South Dakota Codified Laws because of the holding in Hankins. In the 1985 codification, however, the 1961 Act resurfaced as SDCL §§ 1-1-18 through 1-1-21. South Dakota also ended its hiatus in enforcement of state law on Indians on reservation highways. Beginning in January of 1986, several South Dakota trial courts read Yakima Indian to overrule Hankins and convicted Indians of violating South Dakota law while on highways in Indian

country based on the 1961 legislation.[26] An appeal from one of these trial court rulings reached the South Dakota Supreme Court last year in the case of State v. Onihan, 427 N.W.2d 365 (S.D. 1988).

In Onihan, a state highway patrol officer arrested Dennis Onihan, an enrolled member of the Sisseton Wahpeton Sioux Tribe, for "driving under the influence" while on a highway within Indian trust land. In denying Onihan's motion to dismiss, the trial court ruled that South Dakota had jurisdiction over crimes committed by Indians on any highway within the State pursuant to section four of the 1961 Act, codified at SDCL § 1-1-21. Id. at 366. After reviewing both the history of Public Law 280 and the various attempts by South Dakota to take jurisdiction thereunder,

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[26] See cases cited in supra footnote 1.

the Supreme Court of South Dakota analyzed the legal issues in roughly three-quarters of a printed page. Id. at 370. The court abruptly concluded that the exception clause in SDCL § 1-1-21 was sufficient to transfer civil and criminal jurisdiction over Indians for activities on all highways within the state. Id. The court thus affirmed the trial court decision that the state had jurisdiction over an Indian on a highway in Indian country.[27] The court's treatment of Hankins and ultimate holding strongly suggest that Hankins is in effect overruled.[28]

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[27]The court also held that SDCL § 1-1-21 when read together with SDCL § 1-1-18 satisfied the requirement of "affirmative legislative action," as set out in Kennerly v. District Court of Ninth Judicial Dist. of Montana, 400 U.S. 423 (1971).

[28]The court stated:

It seems clear that to the extent that

(Footnote Continued)

III. ANALYSIS

Based on this array of legislation and cases, this Court must determine two interrelated questions: 1) whether the 1961 Act fulfills the requirements of Public Law 280; and 2) whether the 1968 Indian Civil Rights Act amendment of Public Law 280 or the hiatus of some twenty years in enforcement of the 1961 enactment prevents South Dakota from assuming jurisdiction. This Court will consider each of these questions in turn.

A. The 1961 Act and Public Law 280

1. Extent of Deference to Onihan and Validity of the 1961 Act.

As a general rule, federal courts are bound by the interpretation of state law by

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(Footnote Continued)
Hankins held that state assumption of partial jurisdiction was invalid under Public Law 280, it is now overruled by Yakima.

Id. at 369.

the state's highest court. Wainwright v. Goode, 464 U.S. 78, 84 (1983). Federal courts, however, need not abide by state court interpretations of federal law. The Supreme Court has also suggested that with respect to state court decisions involving Public Law 280, a federal court may review state court interpretations of state law influenced by an accompanying interpretation of Public Law 280. Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 151-52 (1984).

In light of Onihan, this Court is unwilling to declare the 1961 legislation to be an invalid legislative act. Despite the withdrawal of the 1961 legislation from the South Dakota Codified Laws between 1974 and 1985, the South Dakota legislature never effectively repealed the 1961 enactment. Although legislation passed in 1963 would

have repealed the 1961 Act, the 1963 legislation never became effective because of the successful referendum in the 1964 election. Though the South Dakota case of In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964) seemed to invalidate the 1961 Act, subsequent cases essentially have overruled Hankins and resurrected the 1961 Act. This Court deems it best to defer to the implicit holding of the South Dakota Supreme Court in State v. Onihan, 427 N.W.2d 365 (S.D. 1988) that the 1961 legislation remains an effective state statute notwithstanding its checkered history.

2. Sufficiency of the 1961 Act under Public Law 280.

The question of whether the 1961 legislation is sufficient to assume Public Law 280 jurisdiction presents an issue squarely within this Court's authority to interpret and apply federal law. Washington

v. Yakima Indian Nation, 439 U.S. 463 (1979) disposes of several potential issues in this case by establishing that states with constitutional disclaimers need not amend their constitutions to take jurisdiction under Public Law 280, id. at 484-93, and that assumption of partial jurisdiction over Indians does not contravene the version of Public Law 280 in effect from 1953 to 1968, id. at 493-500. Since the South Dakota statute at issue in this case predates the 1968 Indian Civil Rights Act, this state enactment must meet the requirements of the original version of Public Law 280 in effect from 1953 until 1968. Id. at 493 n.40; Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering P.C., 467 U.S. 138, 150-51 (1984).

To acquire jurisdiction under the original version of Public Law 280, a state must fulfill apparently only two

requirements: 1) affirmative legislative action; and 2) consistency with the purposes of Public Law 280. The Supreme Court in Kennerly v. District Court of Ninth Judicial District of Montana, 400 U.S. 423 (1971) specifically stated the requirement that a state take "affirmative legislative action" to acquire Public Law 280 jurisdiction. Kennerly derived the requirement of affirmative legislative action from the scant legislative history and the wording of section seven of the 1953 version of Public Law 280. Id. at 427. The Court in Kennerly held that unilateral action by the Blackfeet Indian Tribal Council in enacting a law providing for concurrent state and tribal court jurisdiction over cases involving Indian defendants was insufficient to vest state courts with jurisdiction under either the original or amended versions of Public Law 280. In Onihan v. State [sic], 427

N.W.2d 365 (S.D. 1988), the South Dakota Supreme Court -- though not mentioning Kennerly specifically -- concluded that the exception clause in SDCL § 1-1-21 when read together with SDCL § 1-1-18 qualified as "affirmative legislative action." This Court perceives no reason to disturb this portion of Onihan since the Kennerly standard of affirmative legislative action appears to require little more than a bill duly enacted via the state legislative process.

The second requirement of consistency with the purpose of Public Law 280 is implicit from a number of federal decisions. See, e.g., Washington v. Yakima Indian Nation, 439 U.S. 463, 498-99 (1979) (analyzing whether Washington statute was consonant with the legislative intent of Public Law 280). Although apparently no court has explicitly stated consistency with the goals of Public Law 280 as a prerequisite

to a proper assumption of state jurisdiction thereunder, nearly every federal court when faced with a difficult question under Public Law 280 has analyzed the legislative intent of Congress and evaluated the propriety of state jurisdiction in light of the legislative history. See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207-08 (1987); Three Affiliated Tribes of Ft.. Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 143 (1984); Yakima Indian, 439 U.S. at 498-99; Bryan v. Itasca County, 426 U.S. 373, 379-391 (1976); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 662-64 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1979).

The legislative history surrounding the passage of Public Law 280 in 1953 is somewhat equivocal and sparse. Nevertheless, the United States Supreme Court in Bryan v. Itasca County, 426 U.S. 373 (1976) examined

and discerned the congressional intent in enacting Public Law 280. In Bryan, the Supreme Court held that the explicit grant of jurisdiction contained in Public Law 280 to the State of Minnesota did not authorize a Minnesota county to levy personal property taxes on a mobile home located on Indian trust land and owned by an enrolled member of the Minnesota Chippewa Tribe. The Court, after carefully analyzing the legislative history of Public Law 280, determined that the primary concern of Congress in enacting Public Law 280 was to deal with the problem of lawlessness and the absence of adequate tribal law enforcement on certain reservations. Id. at 379. The Court also noted that Public Law 280 "was plainly not meant to effect total assimilation." Id. at

387.[29] In addition, the Court examined the effect of the ICRA on Public Law 280 and construed the initial Public Law 280 grant in light of the ICRA modifications. Id. at 386.

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[29]The Court in Bryan also quoted the opinion of the Court of Appeals for the Ninth Circuit in Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1979) in stating "courts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'" Bryan, 426 U.S. at 388, n.14. Related maxims of statutory construction in Indian law require this Court to resolve ambiguities in favor of Native Americans and to construe liberally statutes passed on behalf of Native Americans. Antoine v. Washington, 420 U.S. 194, 199-200 (1975); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973). A court, however, may not use these canons of construction to change the meaning of unambiguous statutes or to disregard the express intent of Congress. South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986).

The Supreme Court reaffirmed this interpretation of Public Law 280 in Washington v. Yakima Indian Nation, 439 U.S. 463 (1979), but noted that Public Law 280 was designed to facilitate, not to frustrate, the transfer to states of jurisdiction over Indians. Id. at 490.[30] In addition, other authority suggests that besides reducing lawlessness on reservations, Congress also intended Public Law 280 to accomplish two subsidiary goals: 1) lessening the burden on the federal government of the trust relationship with Indian tribes; and 2) gradually placing the responsibility on

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[30]The report of the committee considering Public Law 280 suggests that the law was a part of the congressional attempt to diminish federal responsibility for Indian affairs and eventually terminate federal supervision altogether. See generally HR Rep. no. 848, 83d Cong., 1st Sess. (1953); S. Rep. No. 699, 83d Cong., 1st Sess. (1953).

individual states to provide criminal and civil forums and laws to govern Indian people.[31] The 1961 Act appears to satisfy the goal of beginning a gradual transfer of responsibility over Indians to the State, but is not likely to alleviate much of the burden

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[31] See Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 542 (1975).

The federal government has abandoned the policy of transferring its trust responsibilities to the states and has adopted legislation encouraging tribal self-dependence and sovereignty. Nevertheless, this Court must apply Public Law 280 as it existed in 1953. Washington v. Yakima Indian Nation, 439 U.S. 463, 493 n.40 (1979); cf., Shakopee Mdewakanton Sioux Community v. Prior Lake, 771 F.2d 1153 (8th Cir. 1985), cert. denied, 475 U.S. 1011 (1986) (consent of Indian tribe embodied in 1968 ICRA amendment not required prior to municipalities annexation of reservation land in Minnesota since Minnesota acquired jurisdiction under original enactment of Public Law 280); St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988) (reluctantly applying termination legislation though termination policy long abandoned).

of the federal trust relationship. However, it is the primary congressional goal of reducing perceived lawlessness on reservations and the motive of South Dakota in seeking partial Public Law 280 jurisdiction that concerns this Court.

The State contends that state jurisdiction over Indians on reservation highways will reduce lawlessness in Indian country and has presented statistics to demonstrate that the rate of fatal highway accidents tends to be three times higher on South Dakota Indian reservations than throughout the rest of South Dakota. Additionally, the State asserts that the political nature of tribal law enforcement frustrates stringent enforcement of drunk driving laws by the tribes. The plaintiff tribes strongly contest these contentions and point to shortcomings and inconsistencies in the statistics presented by the State. The

tribal plaintiffs argue that despite modest budgets for law enforcement, tribal law enforcement is effective.

This Court is reluctant to make a hasty judgment on the efficacy of tribal law enforcement on each of the reservations within South Dakota. Even if the position of the tribal plaintiffs is taken as true, however, the addition of another law enforcement authority with jurisdiction over Indians on highways within Indian country would serve to ensure even further compliance with traffic laws. This Court therefore cannot conclude that the extension of state highway jurisdiction under the 1961 Act disserves the legislative intent of Public

Law 280 to reduce perceived lawlessness on reservations.[32]

This Court, nevertheless, is concerned that South Dakota may be asserting jurisdiction over Indians on highways to raise revenue through traffic ticketing rather than to promote the goals of Public Law 280. The plaintiff tribes assert that the state exercise of jurisdiction over Indians on highways within Indian

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[32]Certainly there are a number of policy arguments for limited South Dakota jurisdiction on reservation highways since state jurisdiction over Indians might lead to strained relationships between the State and tribes, the weakening of tribal law enforcement authority, and the surfacing of difficult jurisdictional questions. Congress in passing Public Law 280 in 1953, however, made the policy decision to permit unilateral assumption by states of jurisdiction over Indians notwithstanding the unpleasant consequences. This Court is not empowered to alter such congressional policy decisions. Such arguments against state jurisdiction are better directed to Congress or the South Dakota legislature.

reservations partially robs from the tribes a source of revenue -- fines from traffic tickets.[33] The history and language of the 1961 legislation indicate that the State was concerned about financing state law enforcement in Indian country. Presumably, the chief reason for excepting highway jurisdiction from the conditional language codified in SDCL § 1-1-21 was that highway jurisdiction is somewhat self-financing as a result of monies collected from traffic tickets.

Throughout this litigation, the State has downplayed the ability of traffic ticket

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[33]State jurisdiction over Indians on reservations pursuant to Public Law 280 is concurrent with continued tribal jurisdiction. F. Cohen, Handbook of Federal Indian Law 367 (1982 ed.). Thus, state enforcement of its traffic laws might dilute -- but would not eliminate -- tribal revenue from traffic tickets.

proceeds to offset costs of law enforcement on highways in Indian country. Rather, the State has emphasized that its motive in extending state highway jurisdiction to Indians in Indian country is to reduce accidents and instances of drunk driving. Indeed, all but one of the arrests of Indians based on the 1961 legislation that this Court is aware of involved intoxicated drivers.[34] Given the evidence presented, it appears that the State does not intend to exercise jurisdiction over Indians as a means of revenue raising.[35] Moreover, though

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[34] See cases cited in supra footnote 1; see also In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964) (drunk driving arrest of Indian under 1961 legislation at issue).

[35] If the State's conduct in enforcing its traffic laws on Indians in Indian country demonstrates that this conclusion is mistaken, this Court might reevaluate its

(Footnote Continued)

financing law enforcement on reservation Indians was a clear concern of the 1961 legislation, there is no evidence that the 1961 Act was enacted as a guise for collecting monies from Indians. Thus, there are insufficient grounds to conclude that the 1961 Act is inconsistent with the policy of Public Law 280.[36]

(Footnote Continued)
judgment. Ideally, the State should negotiate with the tribe a means of dividing traffic ticket monies if the amounts collected by the State exceed the cost of enforcing state traffic laws on reservation Indians.

[36]The South Dakota Supreme Court in In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964) reached the contrary conclusion. The Court in Hankins reasoned:

> It seems to us that [the 1961] legislation does not tend to accomplish or promote the congressional purposes of Public Law 280. To the contrary, it would proliferate the law enforcement authorities in Indian country by adding the state as another entity with geographically limited jurisdiction
> (Footnote Continued)

B. Effect of 1968 ICRA Amendment of Public Law 280.

(Footnote Continued)

> where the Federal and Tribal courts already operate, each with limited subject matter jurisdiction. Moreover, it makes inescapable the checkerboard jurisdiction condemned in Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 [(1962)], wherever the extent of the highway right of way is not clear from markings on the ground. This we think would be commonplace on highways in our sparsely settled Indian reservations.

Id. at 443, 125 N.W.2d at 843.

The court in Hankins believed that Congress in enacting Public Law 280 had two goals: 1) withdrawal of federal responsibility where practicable; and 2) termination of the federal trust relationship. Id. Supreme Court cases subsequent to 1964 demonstrate that the court in Hankins misunderstood the primary intent of Congress. The Hankins court also misread Public Law 280 to disapprove of the partial assumption of state jurisdiction. These misinterpretations of Public Law 280 prompted the Hankins court to conclude that the 1961 legislation departed from the intent of Congress. Consequently, the language in Hankins quoted above is not persuasive.

The plaintiff tribes argue that South Dakota's assertion of jurisdiction over reservation Indians contravenes the 1968 amendments to Public Law 280 enacted through the Indian Civil Rights Act, 82 Stat. 78, codified at 25 U.S.C. § 1321-26. If the ICRA amendments to Public Law 280 apply, assumption of jurisdiction by South Dakota is invalid since the ICRA made consent of Indian people a prerequisite to further assumption of state jurisdiction under Public Law 280. See 25 U.S.C. §§ 1321, 1322, 1326. Indian tribes within South Dakota have never consented to -- and indeed have consistently and adamantly objected to -- state jurisdiction over Indians in Indian country. To support their assertion that the ICRA amendments apply to this case, the tribes appear to make two separate arguments: 1) South Dakota had not assumed jurisdiction in Indian country before the 1968 ICRA

amendments and thus the post-1968 version of Public Law 280 governs; and 2) Congress in enacting the ICRA intended to include South Dakota in the provisions requiring tribal consent for Public Law 280 jurisdiction for states "not having jurisdiction over . . . Indians in . . . Indian country."

The analysis in the previous section of this opinion demonstrates that the assumption of jurisdiction at issue in this case occurred in 1961.[37] The ICRA itself[38] and

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[37]This Court's holding would be entirely different if it found that the assumption of jurisdiction occurred sometime after 1979 when Yakima Indian revealed errors in the legal analysis of In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964). Indeed, if any event after 1968 is taken as the time of South Dakota's assumption of jurisdiction, both the requirements of tribal consent in the ICRA and of affirmative legislative action expressed in Kennerly v. District Court of Montana, 400 U.S. 423 (1971) would be violated. However, the 1961 legislation -- rather than the rebirth of state

(Footnote Continued)

two Supreme Court cases make clear that the ICRA amendments did not affect assumptions of state jurisdiction predating 1968, and thus state enactments before 1968 must be judged under the original version of Public Law 280. Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 150-51 (1984); Washington v. Yakima Indian Nation, 439 U.S. 463, 493 n.40 (1979). Not until 1968 did Public Law 280 contain a provision requiring tribal consent to state

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enforcement of that enactment following Yakima Indian -- is the assumption of Public Law 280 jurisdiction that must be scrutinized.

[38]Section 403(b) of Title IV of the ICRA, codified at 25 U.S.C. § 1323(b), states:

> Section 7 of [the 1953 enactment of Public Law 280] is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

assumptions of jurisdiction in Indian country. See Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L.Rev. 535, 544-45 (1975) (tribal consent intentionally omitted from 1953 enactment of Public Law 280). The 1961 legislation withstands scrutiny under the applicable federal law and thus must be upheld notwithstanding provisions in the ICRA. Cf., Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) (upholding Washington assumption of Public Law 280 jurisdiction without tribal consent when Washington statute predated ICRA amendment of Public Law 280); see also Shakopee Mdewakanton Sioux Community v. Prior Lake, 771 F.2d 1153 (8th Cir. 1985), cert. denied, 475 U.S. 1011 (1986) (tribal consent not required when Minnesota municipality annexes reservation land since Minnesota obtained

Public Law 280 jurisdiction under the original language enacted in 1953).

The second argument of the tribes for the application of the ICRA amendments to this case is that Congress in 1968 believed that South Dakota had failed to take Public Law 280 jurisdiction altogether and thus intended the ICRA requirement of tribal consent to apply to South Dakota. The crux of this argument is that Congress intended South Dakota to be encompassed as a state "not having jurisdiction over . . . Indians in . . . Indian country" as that language is used in sections requiring tribal consent for extensions of state criminal and civil laws.[39] The South Dakota cases in the 1960s

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[39]Section 401(a) of Title IV of the ICRA, codified at 25 U.S.C. § 1321(a), states:

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> The consent of the United States is hereby given to any state not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

Section 402(a) of Title IV of the ICRA, 25 U.S.C. § 1322(a) provides:

> The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all

(Footnote Continued)

disavowing state jurisdiction over reservation Indians[40] and a very small portion of the legislative history[41] support this argument. The tribes thus argue that whatever jurisdiction South Dakota now asserts must be judged under the ICRA amendments to Public Law 280.

It is difficult to reconcile the tribes' interpretation of the ICRA with Section

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> such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

[40] See, e.g., Smith v. Temple, 82 S.D. 650, 152 N.W.2d 547 (1967); In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964).

[41] See supra footnote 7.

403(b) of Title IV of the ICRA, 25 U.S.C. § 1323(b), which provides that the partial repeal of the original language of Public Law 280 "shall not affect any cession of jurisdiction" made under the initial provision authorizing "option" states like South Dakota to assume jurisdiction in Indian country. The legislative history and language of the ICRA indicate that Congress in referring to states "not having jurisdiction" intended neither to single out any particular state or states nor to adjudge which states had or had not assumed jurisdiction before 1968 under Public Law 280. This Court perceives no ambiguity in the ICRA language as it applies to South Dakota. Sections of the ICRA codified at 25 U.S.C. §§ 1321 and 1322 requiring tribal consent would apply to South Dakota attempts to assume jurisdiction after 1968; however, under the ICRA section codified at 25 U.S.C.

§ 1323(b), the tribal consent requirement in the ICRA would not apply to whatever jurisdiction South Dakota had properly assumed prior to 1968. Consequently, the ICRA amendments do not affect the analysis of what jurisdiction South Dakota assumed under the 1961 legislation.

C. Effect of the Lapse in Enforcement in South Dakota of Public Law 280 Jurisdiction

The tribal plaintiffs also argue that it is improper for South Dakota to assert jurisdiction under the 1961 legislation after failing to enforce state jurisdiction over Indians on reservation highways for some twenty years between 1964 and roughly 1984. The tribes cite United States Supreme Court cases recognizing that longstanding practices may create "justifiable expectations" and a "jurisdictional history" may affect interpretation of unclear legislation pertaining to Indian laws. For example, in

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), the Court in examining whether Congress intended to disestablish part of the Rosebud Sioux Reservation through legislation enacted in 1904, noted that:

> . . . the fact that neither Congress nor the Bureau of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority, is a factor entitled to weight as a part of the "jurisdictional history." The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges. We are simply unable to conclude that the intent of the 1904 Act was other than to disestablish.

Id. at 604-05; see also DeCoteau v. District County Court, 420 U.S. 425, 442 (1975); Solem v. Bartlett, 465 U.S. 463, 471 (1984).

The Supreme Court cases relying on jurisdictional history and justifiable expectations are not pertinent to this case for two reasons. First, the "jurisdictional history" and "justifiable expectations" devices are guides for interpretation of unclear statutes. The twenty year hiatus in enforcement under the 1961 Act hardly aids this Court in understanding the pertinent provisions of Public Law 280 and truly only demonstrates that the State took seriously the decision in In Re Petition of Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964), which ruled the 1961 legislation insufficient to accept Public Law 280 jurisdiction. The difficulty with the 1961 legislation is not that it is unclear, but that is has a somewhat checkered history. The twenty year hiatus in state enforcement of its laws against Indians on reservation highways simply is not a useful interpretive tool since it does not influence

a proper understanding of the 1961 legislation or Public Law 280.

Second, state assumption of jurisdiction over Indians on reservation highways does not truly disrupt "justifiable expectations" resulting from the twenty year respite in state enforcement. The tribes imply that enforcement of state law on reservation highways will undermine tribal law enforcement which has been nurtured in the last two decades. As this Court stated earlier, state highway authority under Public Law 280 would be concurrent with continued tribal authority. The State is not displacing tribal authority, but is complimenting it with regard to criminal and civil jurisdiction. Although the tribes through the late 1960s and the 1970s may have expected that they would remain the sole authority over Indians on Indian country highways, the sharing of such authority with

the State does not constitute such a severe disruption of "justifiable expectations" to merit disregarding compelling legal reasons for acknowledging the enforceability of the 1961 legislation. Though this Court is sympathetic to the position of the plaintiff tribes, the jurisdictional history and justifiable expectations analysis in several Supreme Court cases are insufficient grounds to grant judgment in favor of the tribes.

IV. CONCLUSION

Pursuant to the 1953 version of Public Law 280 and state legislation enacted in 1961, South Dakota validly assumed civil and criminal jurisdiction concurrent with the tribes over Indians on all highways within the state. Although the 1961 legislation has a rather checkered history, this Court respects the decision of the Supreme Court of South Dakota that the law remains in effect. The 1961 legislation complies with applicable

federal law requirements under the original language of Public Law 280. Neither the 1968 amendment of Public Law 280 nor the lapse of some twenty years in state enforcement alters the conclusion that South Dakota effectively assumed jurisdiction under Public Law 280. Therefore, this Court denies the motion for summary judgment of the tribal plaintiffs and grants the summary judgment motion filed by the state defendants.

BY THE COURT:

/s/ DONALD J. PORTER
CHIEF JUDGE